FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 19 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 616

McALLISTER LIGHTERAGE LINE, INC.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

ON MOTION TO AFFIRM A DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION

KRISEL & BECK,
Attorneys for Appellant.

MAURICE A. KRISEL,
ROMAN BECK,
Of Counsel.

November 1945.

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	3
Argument	3
Conclusion	10
Appendix	11

Table of Cases

Alton R. Co. v. United States, 315 U. S. 15	2
American-Hawaiian S. S. Co., 250 I. C. C. 219-222	6, 7
Barnes Truck Co. Inc., 24 M. C. C. 465, 467	9
Barrett Line, Inc. v. United States, 89 L. Ed. Adv. Op. No. 17, pp. 1405-1418	2
Brown & McCooey Inc., 18 M. C. C. 503, 505	9
Matter of Carpenter, 32 M. C. C. 580, 582	8, 9
Cornell Steamboat Co. v. United States, 321 U. S. 634	2
Fitzgerald's Exp., 6 M. C. C. 499, 500	9
Hunter Motor Freight, Inc., 27 M. C. C. 51, 53, 54	9
Johnson, 10 M. C. C. 495	9
Kelly, 18 M. C. C. 706	9
Larson, 20 M. C. C. 644	9
L. & L. Freight Lines, Inc., 2 M. C. C. 9, 10	9
Perkins, 10 M. C. C. 507	9
Sudden & Christenson, 250 I. C. C. 419, 422	6
Transamerican Freight Lines, Inc. v. United States, 51 F. Supp. 405, 411 (D. C. D. Del.)	8
United States Lines, 250 I. C. C. 229, 233	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No.

MCALLISTER LIGHTERAGE LINE, INC.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

ON MOTION TO AFFIRM A DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION

Opinion Below

The opinion of the specially constituted three-judge District Court for the Southern District of New York delivered upon rendering the final judgment sought to

be reviewed is set forth in the Jurisdictional Statement which has been filed pursuant to Rule 12 of the Rules of this Court. The opinion has not been reported as yet. No other opinions were rendered in the case.

Jurisdiction

The final judgment in the District Court was entered on August 9, 1945. The petition for appeal was allowed on October 8, 1945.[1] The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of 1913 (38 Stat. 220; 28 U. S. C. 47) and Section 210 of the Judicial Code (28 U. S. C. 47a).[2]

Statute Involved

The relevant portions of the Interstate Commerce Act (54 Stat. 941(a); 49 U. S. C. 909(a); Section 309(a) of Part III of the Act) are set forth in the Appendix *infra*, page 11.

---

[1] The motion to affirm states that the notice to the Attorney General of the State of New York required by 28 U. S. C. 47a was not served with the appeal papers. The fact is, however, that the appeal papers, including the aforesaid notice, were served on October 18, 1945, upon the Attorney General of the State of New York, and an acknowledgment of their timely service, signed by the Attorney General of the State of New York, has been filed with the Clerk of the Court below.

[2] This Court entertained appeals from District Court judgments based upon these statutory provisions in *Barrett Line, Inc.* v. *United States*, 89 L. Ed. Adv. Op. No. 17, pp. 1405-1418, *Alton R. Co.* v. *United States*, 315 U. S. 15, and *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634.

Questions Presented

The motion to affirm the judgment of the District Court is predicated on one ground only, namely, that Appellant had forfeited its "grandfather" rights by dedicating its fleet to essential war work within New York Harbor—transportation exempt from regulation under the Act—after the statutory critical date, January 1, 1940. The questions presented by the motion to affirm are (1) whether, in the circumstances revealed by the record, the employment by Appellant of its facilities in essential war work of a kind exempt from regulation under the Interstate Commerce Act constituted an "interruption of service," within the meaning of Section 309(a) of Part III of the Act; and (2) further, assuming that the preceding question should be answered in the affirmative, whether such interruption in service was one over which Appellant had "control", within the meaning of the Statute.

Argument

Appellant or its predecessors have been engaged in marine transportation since 1864, and the business has been continuously owned by its founder or his descendants through four generations. In the past, Appellant's business activities have been varied and extensive and at one time were worldwide in scope. At the time of the hearing before the Commission, Appellant either owned or had under charter 101 units of floating equipment (Report of Division 4 of the Interstate Commerce Commission, Sheet 3), all of

which, as the Commission found, have been engaged in the performance of lighterage and other work essential to the war effort since January 1, 1940 (*Id.*, Sheets 3-4). In denying the "grandfather" rights sought by Appellant, the Commission based its conclusion upon two grounds—first, the Commission found that "for a period of over ten years [Appellant] has performed only an inconsequential amount of transportation of a kind that is now subject to the Act, * * *" (Report of Division 4, Sheet 4). The undisputed evidence before the Commission revealed that the impact of the general economic depression upon Appellant's business was so severe that at various times prior to 1940 its operations were limited to one or two tugs and a few inland scows and lighters. The Commission's examiner explicitly so found (Proposed Report Sheet 4). The Commission itself did not disturb this finding; its report is entirely silent on the subject. Before the Commission and the District Court, Appellant contended that the paucity of its operations during the depression period prior to January 1, 1940, was an interruption in service beyond Appellant's control, within the meaning of Section 309(a) of the Act. The Commission omitted findings on this aspect of the case even though Appellant sharply called the omission to the attention of the Commission in its petition for reconsideration addressed to the full Commission. The District Court made it clear, in the course of its opinion, that it would have remanded the proceeding to the Commission for appropriate findings on this critical aspect of the case if there were not an independent ground upon which the Commission's order could

stand. The District Court observed in this connection:

> "It is true that the Commission did not make a definite finding that the interruption in service before January 1, 1940, either was or was not beyond the control of petitioner and its predecessors, and if decision were wholly dependent upon the fact as to that matter the petitioner would have substantial ground for insisting that the cause be remanded to the Commission for a finding on that point. * * * "

The District Court sustained the order, however, upon the Commission's second ground, namely, the Commission's conclusion that appellant had "considerable facilities available [at the time of the hearing], the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor" (Report of Division 4, Sheet 4). This conclusion was arrived at in the teeth of an explicit fact finding by the Commission that, "since January 1, 1940 [Appellant's] fleet has been engaged almost exclusively within New York Harbor in the performance of lighterage and other work essential to the War effort" (Report of Division 4, Sheets 3-4). In its motion to affirm, the Government recognizes that the decision of the court below can be sustained only if the District Court was correct in holding that Appellant forfeited its "grandfather" rights by employing its facilities after January 1, 1940, in exempt transportation which was essential war work.

Appellant submits that the Commission itself has repeatedly held in construing Section 309(a) of the Act that a carrier does not forfeit "grandfather" rights by diverting its fleet from its normal service to essential war work. Interpreting Section 309(a) of the Act, the Commission has stated that the dedication of a carrier's fleet to essential war work should be regarded "in the interest of national defense" (*American-Hawaiian S. S. Co.*, 250 I. C. C. 219, 222), as an interruption in service beyond the carrier's control within the meaning of the proviso in the "grandfather" clause of the Act.[3]

In the *American-Hawaiian* case, the Commission squarely ruled that a diversion of a carrier's vessels from its normal routes to another service in order to conform to a mere *request* of the Maritime Commission was not a "voluntary" diversion that should work a forfeiture of its "grandfather" rights. In that case, the carrier had withdrawn its vessels from serving thirty-six ports as to which it claimed "grandfather" rights in order to place them in a service deemed essential to national defense. If the *American-Hawaiian* decision is to be distinguished from the instant case, the distinction can be made only on the ground that there the Maritime Commission had requested the change in the carrier's service. Unless, however, judicial notice is taken of the Government's power to enforce such a "request" by requisition of the carrier's vessels in the event of a refusal to comply, the car-

[3] See, also, *United States Lines*, 250 I. C. C. 229, 233; and *Sudden & Christenson*, 250 I. C. C. 419, 422.

rier's compliance with the request must be viewed as voluntary. But if judicial notice of the Government's requisition power may properly be taken (see Section 902 of the Merchant Marine Act of 1936, as amended), then the *American-Hawaiian* case is indistinguishable in principle from the present case.

Appellant contended further, as the evidence clearly demonstrates, that the War completely dislocated the normal flow of traffic; that wartime transportation exigencies channeled domestic water-borne traffic into a relatively few routes, concentrating such traffic in a few strategic localities. A consequence of these wartime conditions was that the flow of traffic in and out of the Port of New York swelled to gigantic proportions, a condition which brought about the intensive utilization in New York Harbor of every available lighter and scow. Appellant emphasized before the Commission and the court below that aside from economic forces generated by the War, Appellant diverted its fleet to New York Harbor because it realized that the Government would have forced it to take such action through its power of requisition, had Appellant not anticipated coercive measures. For these reasons, Appellant contended that the Commission erred in concluding that Appellant's action in confining its service to New York Harbor was voluntary. Lastly, Appellant pointed out to the Commission and the court below that the deployment of its fleet in New York Harbor for the duration of the War was a temporary expedient and that evidence that Appellant intended to abandon permanently its normal routes was wholly lacking. A long line of Commission and judicial deci-

sions has held in construing the "grandfather" clause of the Act that an interruption of service warranting a forfeiture of "grandfather" rights must be of such a nature as to justify an inference of abandonment. (Cf. *Transamerican Freight Lines, Inc.* v. *United States*, 51 F. Supp. 405, 411 (D. C. D. Del.)) Illustrative of the Commission's interpretation of the proviso in the "grandfather" clause of the Act is its decision in *Matter of Carpenter*, 32 M. C. C. 580, 582, the relevant portion of which is set out in the margin.[4]

---

[4] "Some time during 1937 the shipper for whom applicant had been transporting beer from Newark lost the agency. The brewery which previously had been the source of supply opened its own distribution agency at Providence, and has since transported its products to Providence in its own vehicles. While no specific date is indicated as to when the transportation from New York and West Haven was discontinued, it is admitted that no transportation has been performed from these points since 1937. Applicant has solicited shippers at various times, but without success. He contends that the cessation is one over which he has no control, and that he is ready and willing to resume this operation if and when he is able to obtain the traffic. The sole question here is whether applicant's present situation is the result of some act or omission within his control. Certainly he cannot be held responsible for the change by the shipper in the method and place of its distribution of these malt beverages. Likewise, the theory of cessation of operations within applicant's control cannot, in this case, be supported by the fact that applicant failed to obtain any traffic since this change in 1937. Nothing that applicant has done suggests, even remotely, that there was any desire or intention to abandon service. On the contrary, his acts show beyond doubt that he held himself ready, able and willing to conduct transportation and we think were sufficient, in these circumstances, to satisfy the continuity of service requirements of the statute. To hold otherwise would result in situations, in cases like this, where through no fault of its own a carrier may be left with its investment, but

(Footnote continued on page 9)

In arguing that the diversion of Appellant's fleet to essential war work constituted a voluntary abandonment of its normal service, the Government places chief reliance upon the decision of this Court in *Gregg Cartage Company* v. *United States*, 316 U. S. 74. The *Gregg* decision is clearly distinguishable on its facts from the instant case. The holding in the *Gregg Cartage* case (316 U. S. 74) that a cessation in service following bankruptcy was within the carrier's control must be read in the light of the fact that the carrier resorted to a "friendly receivership in the state court" (316 U. S. at 79) which "precipitated the involuntary bankruptcy in the federal courts, which in turn brought operations to a halt". (*id.*). Thus, the cessation was due to the voluntary action of the carrier in arranging for the "friendly receivership" in the state court.[5]

(Footnote continued from page 8)
with no possibility of putting it to use should the traffic return or new similar traffic develop. We conclude that applicant is entitled to 'grandfather' authority, which would permit continuing the operations in question." *Carpenter*, 32 M. C. C. 580. See also *Larson*, 20 M. C. C. 644; *Johnson*, 10 M. C. C. 495; *Perkins*, 10 M. C. C. 507; *Brown & McCoocy, Inc.*, 18 M. C. C. 503, 505; *L. & L. Freight Lines, Inc.*, 2 M. C. C. 9, 10; *Kelly*, 18 M. C. C. 706; *Fitzgerald's Exp.*, 6 M. C. C. 499, 500; *Barnes Truck Co. Inc.*, 24 M. C. C. 465, 467; *Hunter Motor Freight, Inc.*, 27 M. C. C. 51, 53, 54.

[5] The Court emphasized this when it pointed out (316 U. S. at 81):

> "When it found itself unable to meet its obligations, Gregg arranged a receivership in the state court, securing the appointment of its own counsel as receiver. Only the one creditor which filed the bill appears to have been consulted. Thus, the petitioner not only arranged deliberately to commit an act of bankruptcy but it managed the affair in a manner not unlikely to provoke the unconsulted creditors to file a petition in bankruptcy * * *."

Plainly, therefore, the *Gregg* decision lends no support to the argument that an interruption of service which was brought about by the exigency of national defense under the shadow of the Government's requisition power constituted a voluntary abandonment of the carrier's normal service so as to work a forfeiture of its "grandfather" rights.

Conclusion

The denial of "grandfather" rights in and of itself lessens substantially the going concern and sale value of Appellant's business. As Judge Douglass pointed out in the *Gregg Cartage* case (316 U. S. at 87): "Operating rights are the very life of any [carrier's] business. Without them this business certainly has no more than scrap value." The issues on this appeal have never to our knowledge been determined by any court other than the court which rendered the judgment from which this appeal is prosecuted, and are of great public concern in that they present questions of large importance in the postwar administration of the "grandfather" clause in Section 309(a) of the Interstate Commerce Act. For these reasons, it is respectfully submitted that the motion to affirm should be denied.

Respectfully submitted,

Krisel & Beck,

By Maurice A. Krisel,

Attorneys for Appellant.

Maurice A. Krisel,

Roman Beck,

Of Counsel.

November, 1945.

APPENDIX

The relevant portion of the Interstate Commerce Act (Section 309(a)) is as follows:

> Except as otherwise provided in this section and Section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* that, subject to section 310, *if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940,* over the route or routes or between the ports with respect to which application is made and *has so operated since that time* (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) *except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control,* the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section, and prior to the expiration of one hundred and twenty days after this section takes effect; (emphasis supplied).